IN THE

Supreme Court of the United States

October Term, 1978

No. 78-877

JOHN L. CONNOLLY, C. V. HOLDER, HOWARD C. DENNIS, JOHN C. MAXWELL, JAMES J. KIRST, C. WILLIAM BURKE, KENNETH J. BOURGUIGNON, JOSEPH H. SEYMOUR, RICHARD L. CORBIT, HAROLD EDWARDS, DONALD E. MIER, WILLIAM C. WAGGONER, RICHARD GANNON and ALFRED HARRISON, each in his respective capacity as Trustee of the OPERATING ENGINEERS PENSION TRUST,

Petitioners,

vs.

PENSION BENEFIT GUARANTY CORPORATION, a nonprofit corporation established within the Department of Labor of the United States of America,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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November 1978.

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SUBJECT INDEX

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To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, the above-named Trustees of the Operating Engineers Pension Trust, join herein and pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit finally entered on September 8, 1978, in Case No. 76-2777 of that Court.

Opinions Below.

The opinion of the Court of Appeals is reported at 581 F.2d 729 and appears at Appendix A (pp. 1a-12a) of this Petition. The order of the Court of Appeals denying the petition for rehearing and rejecting the suggestion for a rehearing *en banc* appears at Appendix B (p. 13b) of this Petition. The decision of the United States District Court for the Central District of California is reported at 419 F.Supp. 737 and appears at Appendix C (pp. 14c-25c) of this Petition.

Jurisdiction.

The opinion of the Court of Appeals was filed on May 4, 1978, and entered on May 9, 1978. A timely petition for rehearing and suggestion for rehearing *en banc* by the Petitioners was denied by order of the Court of Appeals filed on September 6, 1978, and entered on September 8, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Questions Presented.

The questions presented by this petition are:

1. May the Employee Retirement Income Security Act of 1974 be fairly construed to classify as a "defined contribution plan" a pension plan under which the employer's contribution is fixed and the employee receives whatever level of benefits the amount contributed on his behalf will provide? Or,

2. Did Congress intend, as the Court of Appeals concluded, "to impose substantial, new and in some cases retroactive liabilities upon the contributing em-

ployers" of multi-employer pension trusts by changing "defined contribution plans" to "defined benefit plans" through passage of the Act?

Statutes Involved.

This case involves §§ 3(34) and 3(35) of the Employee Retirement Income Security Act of 1974, ("ERISA" or "Act"), 88 Stat. 838, 29 U.S.C. § 1002 (34), (35), which provide as follows:

> "(34) The term 'individual account plan' or 'defined contribution plan' means a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account.
>
> "(35) The term 'defined benefit plan' means a pension plan other than an individual account plan [defined contribution plan] . . ."

Section 4021 of the Act, 88 Stat. 1014-16, 29 U.S.C. § 1321, identifies pension plans which are not covered by the "plan termination insurance" provisions of the Act, in pertinent part, as follows:

> "(b) This section does not apply to any plan—
>
> (1) which is an individual account plan [defined contribution plan], as defined in paragraph (34) of Section 1002 of this Title . . .
>
> "(c)(1) For purposes of subsection (b)(1) of this section, the term 'individual account plan' [defined contribution plan] does not include a

plan under which a fixed benefit is promised if the employer or his representative participated in the determination of that benefit."

Interpretation of these statutory provisions will require consideration of the provisions of the Act as a whole. The Act, 29 U.S.C. §§ 1001-1381, 88 Stat. 829-1035, is voluminous and is separately presented for convenience.

Statement of the Case.

This case presents for decision whether ERISA changed the basic legal structure of all multi-employer pension trusts from "defined contribution plan" to "defined benefit plan". The District Court concluded that the Pension Plan of the Operating Engineers Pension Trust remains a "defined contribution plan" providing whatever level of benefits can be afforded based upon the contribution paid by participating employers, and is not a "defined benefit plan" in which the employer has promised a fixed retirement benefit. The Court of Appeals reversed, ruling that the Pension Plan cannot qualify as a "defined contribution plan" under the statutory definition of ERISA because the Plan pays benefits in the nature of a pension rather than providing merely an individual "savings account" for each employee covered by the Plan.

The Court of Appeals held that forcing upon the contributing employer "a greater obligation and liability than he had originally agreed to in his contract . . . [was] . . . precisely what the termination insurance provisions of the Act were intended to do." Citing §§ 4062-68 of ERISA [88 Stat. 1029-33, 29 U.S.C. §§ 1362-68], which impose contingent liability for payments up to 30% of the net worth of each employer who contributes to a "defined benefit plan", the Court

of Appeals ruled that "*the precise intent of these sections was to impose substantial, new and in some cases retroactive liabilities upon the contributing employers of the plan.*" (Emphasis added.) (*App.*, pp. 6a-7a.)

The Operating Engineers Pension Trust was established in 1960 and now holds more than $250,000,000 in assets for the benefit of nearly 30,000 employees. An estimated 2,000 other multi-employer pension trusts are similarly established under §302(c)(5) of the Labor-Management Relations Act of 1947 [61 Stat. 157, 29 U.S.C. § 186(c)(5)] with "defined contribution plan" legal structures comparable to this Trust.[1] Such pension trusts together hold $35 Billion in assets for the benefit of 8.5 million covered employees.

Protecting the integrity of the trust instrument, and securing fair play for contributing employers would be sufficient reasons for granting review in this case. But the Board of Trustees of the Operating Engineers Pension Trust seek this review out of profound concern that the Court of Appeals' decision *will actually cause the financial collapse of the Trust and multi-employer pension trusts across the country.*

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[1]The critical provisions of the Trust Agreement and the Pension Plan are quoted in the Opinion of the District Court, 419 F.Supp. at 739-40 (*App.*, pp. 18c-20c). PBGC and organizations filing *amicus* briefs in the Court of Appeals concur that the trust instrument and pension plan in this case "structurally typif[y] the overwhelming majority of collectively-bargained multi-employer pension plans, so-called Taft-Hartley plans."

Reasons for Granting the Writ.

1. Fundamental Importance of Question Presented.

The Court of Appeals has decided a federal question in a way in conflict with this Court's decision in *Alabama Power Co. v. Davis,* .... U.S. ...., 97 S.Ct. 2002 (1977).[2] To the extent that the statutory interpretation of "defined contribution plan" in *Alabama Power Co. v. Davis* may be regarded as collateral rather than controlling precedent, the Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

2. Review of the Court of Appeals Decision at This Time Is Urgently Needed to Prevent Immediate and Irreparable Damage to Multi-Employer Pension Trusts.

The Court of Appeals' decision is presently a major disruption in the orderly administration of multi-employer pension trusts and the normal continuation of collective bargaining relationships. This disruption arises essentially from these factors:

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[2]In *Alabama Power,* this Court construed the same statutory definitions of "defined contribution plan" and "defined benefit plan" which are crucial in this case as follows:

> "Petitioner's plan is a *'defined benefit' plan under which the benefits to be received by employees are fixed and the employer's contribution is adjusted to whatever level is necessary to provide those benefits.* The other basic type of pension is a *'defined contribution' plan, under which the employer's contribution is fixed and the employee receives whatever level of benefits the amounts contributed on his behalf will provide.* See 29 U.S.C. § 1002(34),(35); . . ." (Emphasis added.) 97 S.Ct. at 2009, note 18.

As construed by this Court, the statutory definitions of § 3(34) and (35) of the Act maintain the traditional basis for distinguishing between a "defined contribution plan" and a "defined benefit plan"; *i.e.,* whether the employer has promised to provide a fixed contribution or a fixed benefit. This Court also stated that the Act "does not alter the nature of pension plans" in any manner relevant to the question presented in *Alabama Power.* 97 S.Ct. 2008, note 13.

(a) the imposition of new, substantial and retroactive liabilities on thousands of contributing employers creates a compelling impetus among those employers to terminate participation in multi-employer pension trusts;

(b) loss of the union right to strike to require employer participation in multi-employer pension trusts with pre-selected trustees will result, if trustees are deemed to promise benefits for which the contributing employers are liable;

(c) trustees are uncertain whether they are to act as independent fiduciaries in administering trust assets solely in the interests of participants and beneficiaries, or as employer representatives who incur liabilities subject to employer control; and

(d) trustees are uncertain of the proper implementation of this Court's decision in *Alabama Power Company v. Davis,* since the decision of the Court of Appeals has modified and greatly expanded the class of "defined benefit" plans expressly within the ambit of this Court's decision.

Each of these factors will significantly affect irreversible economic decisions and events in collective bargaining and pension trust administration within coming months. Many trustees, unions and employers across the country have watched this case and depended upon affirmance of the District Court's decision to sustain their longstanding practices. Now the Court of Appeals' decision forces hard decisions to be made by those trustees and collective bargaining parties about the drastic changes in their relationships seen by the Court of Appeals. Trustees of multi-employer pension trusts need and deserve the earliest possible resolution of the issues raised by this case.

3. Intense National Interest in the Issues Presented by This Case Will Assure Adequate Briefing and Examination of the Issues From All Points of View.

This case has been the subject of more concerted attention and discussion than any case since ERISA became law, with the possible exception of *Teamsters, Local 705 v. Daniel*, Case Nos. 77-753 and 77-754, now pending decision by this Court. Unlike the *Daniel* case, however, the economic consequences of this case are not limited to the costs of implementing a regulatory scheme with disputed applicability to pension plans. The economic consequences of this case are as substantial as can flow from destruction of the basic legal structure which is essential to the viability of multi-employer pension trusts.

Six briefs *amicus curiae* were filed in the Court of Appeals by interested organizations. A comparable or greater degree of interest and participation in the proceedings of this Court can reasonably be anticipated.

4. The Financial Stability of Multi-Employer Pension Trusts Is Threatened by Immediate Wholesale Losses of Employer Participation.

Unless review of the Court of Appeals' decision is granted, a mass exodus of employers from participation in multi-employer pension trusts can be foreseen as resulting from two powerful forces.

One of these forces is the employer's economic incentive to avoid legislative/judicial imposition of "new, substantial, and in some cases retroactive" liabilities which those "sufficiently enlightened"[3] employers who

[3] *Allied Structural Steel Company v. Spannaus*, ... U.S. ....., 98 S.Ct. 2716, 2726 (1978).

have participated in such pension trusts never contracted to assume. Past union efforts have presumably maximized the number of employers participating in multi-employer pension trusts through collective bargaining agreements which set a "fixed contribution" by the employer. Unions cannot be expected to achieve the same number of employer agreements when the employer's liability is changed from a "fixed contribution" to *retroactive, uncertain, open-ended and joint liability with other contributing employers.*[4]

The second major force which will severely disrupt employer participation arises from recognition that the collective bargaining laws do not permit unions to strike to require participation in multi-employer trusts if the trustees serve as employer representatives. Briefly, the Court of Appeals' decision makes contributing employers contingently liable for the eventual cost of benefits adopted by the trustees and described in the Pension Plan. If the Pension Plan is a "defined benefit plan," the amount of an employer's liability to the Trust has been and will be varied by Trustee decisions regarding investments and pension benefits. In effect, the Trustee is deemed to be the employer's representative or agent for purposes of "promising" pension benefits or managing Trust assets. This new role for the Trustee directly conflicts with his duty as an independent fiduciary under prior law and under the Act to serve solely the interests of plan participants and beneficiaries. *Toensing v. Brown*, 528 F.2d 69, 72 (9th Cir. 1975). Act § 404(a)(1), 88 Stat. 877, 29 U.S.C. § 1104(a)(1). *This change in the relation-*

[4] Jett, "The Path to Destruction of Taft-Hartley Pension Trusts: Mandatory 'Defined Benefit Plan' Status", 28 *Labor Law Journal* 403, 406-408 (July, 1977).

ship between trustees and contributing employers from independent fiduciary to representative or bargaining agent removes the essential element from the legal structure of multi-employer pension trusts which has enabled unions to use the economic pressure of a strike to encourage employer participation.

This concern can best be illustrated by reference to the recent decision of the National Labor Relations Board in the case of *Sheet Metal Workers International Association, Local 493 (Central Florida Sheet Metal Contractors Association, Inc.)*, 234 NLRB No. 162, 97 LRRM 1476 (1978). In that case, the Board considered whether a union may lawfully strike to require employer participation in a multi-employer benefit trust with pre-selected trustees, in view of §8(b)(1)(B) of the National Labor Relations Act, as amended [61 Stat. 141, 29 U.S.C. § 158(b)(1)(B)].[5] The Board concluded that § 8(b)(1)(B) was not violated by a strike to require employer participation in a trust with pre-selected trustees. The Board's examination of the trust documents of that multi-employer welfare benefit trust and the applicable law showed that *the trustees were bound to act solely as independent fiduciaries and could not affect the extent of employer liability* through the performance of their discretionary functions in the internal administration of the trust. 97 LRRM at 1484-1487. Therefore, the Board concluded that the union could lawfully strike to require an employer to accept the pre-selected trustees to perform the fiduciary functions of internal administration of trust assets.

[5] "(b) It shall be an unfair labor practice for a labor organization or its agents—(1) to restrain or coerce . . . (B) an employer in the selection of his representatives for the purposes of collective bargaining or the adjustment of grievances . . ." 29 U.S.C. § 158(b)(1)(B).

Considering the Board decision in *Sheet Metal Workers* in light of the Court of Appeals' decision in this case, § 8(b)(1)(B) will protect an employer from union pressure to accept a trustee whose daily decisions will affect the extent of employer contingent liability for the cost of pension benefits. If trustees are empowered to adopt and administer pension benefits for which contributing employers become liable under the Act, then labor organizations will lose the right to strike to require an employer to participate in an existing multi-employer pension trust. Each employer would have the right to choose, at its sole discretion, a single-employer pension plan with one or more management trustees who would be entirely faithful to the wishes of the appointing employer. The existing level of employer participation in multi-employer pension trusts cannot be maintained under those circumstances.

The National Labor Relations Board presently has pending decision a case raising the § 8(b)(1)(B) issue in the context of a major multi-employer pension trust. *United Mine Workers of America, Local No. 1854 (Amax Coal Company)*, Case Nos. 27-CB-900, 27-CC-571 [JD-(SF)-45-77]. In 1977, an Administrative Law Judge recommended a decision in that case upholding the union right to strike to require employer participation based upon substantially the same legal rationale as has now been adopted by the Board in the *Sheet Metal Workers* decision. Of course, the decision of the Court of Appeals in this case was not available at the time the Administrative Law Judge made his recommendation. If the Board were to accept the Court of Appeals' decision as correctly stating the changed relationship between contributing employers and trustees regarding liability for the costs of pension benefits, the results of such

a Board decision would be immediately and irreversibly damaging to multi-employer pension trusts. A Board decision that a union strike to require employer acceptance of pre-selected trustees violates § 8(b)(1)(B) would control unfair labor practice proceedings regulating union strikes at least until judicial review of the Board decision could prevail. Indeed, such a Board decision would appear to be well-founded under collective bargaining law if the Court of Appeals' decision is correct.

The financial shock of such developments would be more than many multi-employer pension trusts could withstand, even on an interim basis. A basic actuarial assumption underlying the financial soundness of each multi-employer pension trust is the projected future level of participation in the trust. Any appreciable reduction in employer participation (*i.e.*, flow of funds into the pension trust) causes a *per capita* increase in costs of benefits for remaining participants, which in turn may precipitate further contractions in participation, ultimately causing termination of the pension plan.[6] If unions are to have a reasonable chance to maintain the level of employer participation in multi-employer pension trusts, then unions must be able to continue their past practices of agreeing that employer liabilities will be limited to payment of a "fixed contribution" to the pension trusts. The Court of Appeals' decision takes

[6]Section 4043(b)(3) of the Act [88 Stat. 1024, 29 U.S.C. § 1343(b)(3)] requires a "defined benefit plan" to give PBGC written notice of a "reportable event" when the plan experiences a 20% decrease in the number of active participants within one plan year or a 25% decrease in the number of active participants within two plan years. Such a "reportable event" may result in involuntary termination of the pension plan by PBGC under Section 4042(a)(4) of the Act [88 Stat. 1021, 29 U.S.C. § 1342(a)(4)].

from unions the discretion to agree upon a "fixed contribution" employer liability, and thereby places multi-employer pension trusts in serious danger of termination within the near term. The granting of this petition will forestall such events.

5. Trustees Are Torn Between Conflicting Duties to Act as Independent Fiduciaries Solely in the Interests of Participants and Beneficiaries or to Respond to the Interests of Employers Who Are Newly Liable for All Costs of Pension Plan Benefits.

This is no mere theoretical concern, but a significant, practical dilemma. The efficiency of trustee decision-making and the outcome of deliberations on investments and benefits administration are undercut and compromised by the great uncertainty on this issue.

On the one hand, courts have forebade trustees from acting in a manner which provides collateral advantages to the union or the employers and have viewed the statutory scheme as reinforcing "the most fundamental duty owed by the trustee: the duty of undivided loyalty to the beneficiaries." *Blankenship v. Boyle,* 329 F.Supp. 1089, 1094-95 (D.D.C. 1971). The National Labor Relations Board in *Sheet Metal Workers* has rejected the contention that fiduciary obligations to plan beneficiaries can coexist with a trustee duty "to advance, whenever possible, the interests of their appointing parties". The Board adopted that conclusion after considering views of the Secretary of Labor that "the fiduciary obligations imposed by ERISA are diametrically opposed to the obligations of a collective bargaining representative" and that combining such duties would place the trustees "in a virtually untenable position regarding the proper execution of their fidu-

ciary duties" to plan participants. *Sheet Metal Workers, supra,* 97 LRRM at 1485-87. Scholarly authority expresses the established principle that trustees must display "complete loyalty to the interests of the *cestui que trust* and must exclude all selfish interest and all consideration of the welfare of third persons" based upon reasoning that "it is generally, if not always, humanly impossible for the same persons to act fairly in two capacities and on behalf of two interests in the same transaction." Bogert, *Trusts and Trustees,* 2nd Ed., § 543. These views are simply restatements of "the precept as old as Holy Writ that 'a man cannot serve two masters.' " Stone, "The Public Influence of the Bar," 48 *Harv. L. Rev.* 1, 8.

Yet, the holding of the Court of Appeals makes contributing employers ultimately liable for the costs of all decisions made by trustees appointed by the employers. That circumstance cannot reasonably foresee total abstinence by employers from attempts to influence or control trustee decisions. Indeed, the National Labor Relations Board has held that § 8(b)(1)(B) is specifically intended to insure that "an employer may bargain through a freely chosen representative that is completely faithful to his interests." *Sheet Metal Workers, supra,* 97 LRRM at 1486. See, also, the review of the purpose of § 8(b)(1)(B) by this Court in *Florida Power & Light Company v. International Brotherhood of Electrical Workers, Local 641,* 417 U.S. 790, 798-813, 94 S.Ct. 2737, 2741-49 (1974).

This Court's review of the Court of Appeals' decision in this case is urgently needed to remove the cloud of uncertainty over trustee decision-making by settling whether employers are liable for the costs of trustee

decisions and, if so, whether the trustee owes the employer any duty in that respect.

6. The Statutory Scheme of the Act Logically Lends Itself to an Interpretation Which Maintains the Traditional Distinction Between a "Defined Contribution Plan" and a "Defined Benefit Plan."

This Court's decision in *Alabama Power Company v. Davis, supra,* amply demonstrates this premise. Indeed, since the distinction between the two types of plans has such fundamental importance under pre-existing law and under the Act, and the Act maintains the nomenclature of "defined contribution plan" and "defined benefit plan" for the two basic types of plans, a view that Congress wrote the technical definition of "defined contribution plan" to re-classify substantially all pension plans as "defined benefit plans" is both logically and morally suspect.

Moreover, if the statutory definition of "defined contribution plan" is to permit a true "pension plan" to exist, then the definition logically means a pension plan whose benefits to the individual participant are based solely upon the plan assets allocated to the participant, and not upon any underlying employer promise secured by a pledge of employer assets.

7. The Legislative History of the Act Supports the View That Congress Intended to Maintain the Traditional Interpretation of "Defined Contribution Plan."

When the House Committee on Education and Labor considered the drafted legislation during 1973, five minority members of the Committee expressed opposition to any "[radical] changes [in] the basic legal structure" of pension plans and raised "a serious constitutional question as to whether by legislation we can

change the contract of the employer from a promise to make certain contributions to a fund to a promise to pay the pension supported by a pledge of the employer's assets." *Legislative History of* [*ERISA*], pp. 2387-88. The legislation there under consideration covered *only* single-employer plans with plan termination insurance and employer contingent liability. In 1974, two of the Congressmen who expressed those views (Hon. Albert H. Quie and John N. Erlenborn) were members of the Joint Conference Committee which redrafted the legislation to cover "defined benefit plans" and exclude "defined contribution plans" from plan termination insurance and employer contingent liability. In reporting the bill drafted by the Joint Conference Committee back to the House, Mr. Erlenborn stated that he and the chairman of the House Education and Labor Committee had "come to almost total agreement." *Legis. Hist.*, pp. 4662-68. Moreover, the chairman of the House Committee on Ways and Means (Hon. Al Ullman) stated on the floor of the House at the time of enactment that "plan termination insurance is mandatory for private defined benefit plans" with no indication that the Joint Conference Committee intended an abandonment of the traditional distinction between a "defined contribution plan" and a "defined benefit plan". *Legis. Hist.*, p. 4678. Likewise, the report of the Joint Conference Committee contains no statement of intent that the traditional understanding of "defined contribution plan" was to be abandoned, or that employers who had contracted to pay only a "fixed contribution" would be liable for the unknown cost of pension benefits. The legislative history does not show a conclusion that the "fixed contribution" legal structure was so objectionable in the context of a multi-employer pen-

sion trust as to warrant a mandatory change to a "fixed benefit" legal structure and, further, shows no exploration of potential adverse effects on existing multi-employer pension trusts of such a mandated change in legal structure.

The momentous change in the legal affairs of existing multi-employer pension trusts announced by the Court of Appeals is undetectable in a reading of the Joint Conference Report, or the Act itself, until the "fine print" of the statutory definition of "defined contribution plan" is construed to exclude any pension plan which provides a pension rather than an individual savings account for each participant. The ambiguous words of the statutory definition are not sufficiently compelling to warrant that far-reaching result.

8. The Secretary of Labor and the Secretary of the Treasury Initially Issued Official Pronouncements Under the Act Which Maintained the Traditional Interpretation of "Defined Contribution Plan."

A "target benefit plan" is a specific type of "defined contribution plan" recognized in Section 202(a)(2) of the Act [88 Stat. 853, 29 U.S.C. § 1052(a)(2); 88 Stat. 899, 26 U.S.C. § 410(a)(2)]. The Secretary of Labor described the "target benefit plan" in the first official "Form EBS-1 Plan Description and Instructions" as follows:

> " 'Target Benefit Plan' is a plan which provides that *the amount of the employer's contribution has been established at a level to enable the plan to pay a defined benefit to each participant upon his retirement; however, the plan does not promise to pay that benefit; its only obligation is to pay whatever benefit can be provided by the sums contributed for him.*" (Emphasis added.)

The Secretary of the Treasury has published temporary and proposed regulations under § 410 of the Internal Revenue Code describing a "target benefit plan" as follows:

> ". . . [A] *target benefit plan is a defined contribution plan* under which the amount of employer contributions allocated to each participant is determined under a plan formula which does not allow employer discretion and on the basis of the amount necessary to provide a target benefit specified by the plan for each participant. *Such target benefit must be the type of benefit which is provided by a defined benefit plan* . . ." (Emphasis added.) *I.R.C.* Reg. § 1.410(a)-4. Treasury Decision 7380.

These pronouncements were called to the attention of the District Court and the Court of Appeals. But neither PBGC, nor the Secretaries of Labor and the Treasury in their *amicus* brief, ever acknowledged this concern or offered any argument seeking to justify their new position supporting expansion of PBGC's jurisdiction. In erroneously giving "great deference" to PBGC's views, the Court of Appeals never addressed this consideration.

9. The Interests of Sound Judicial Administration Will Be Served by the Granting of This Petition.

The statutory interpretation issues presented by this case are complex and far-reaching. Careful consideration and resolution of those issues will fully occupy the parties and this Court if the petition is granted. Returning the case to the District Court for trial of the constitutional issues and later return to this Court would greatly increase the likelihood of irreparable damage to the financial stability of multi-employer pension trusts in the interim and, in addition, would expand the scope and complexity of issues presented to much less manageable proportions.

While this case has been pending, numerous other cases (in a total number best known by PBGC) have been filed by trustees of other pension trusts in federal courts in California and across the country seeking the relief against PBGC granted by the District Court below. The proceedings in those cases have been held in abeyance pending disposition of this case. That circumstance encourages the granting of this petition for two reasons. First, no other case presenting the same issues will become available for review by this Court before long delay. Secondly, denial of this petition can be expected to trigger further proceedings in those pending cases, all at great expense to the judicial system and the parties.

Conclusion.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

WAYNE JETT,
Counsel for Petitioners.

November 1978.

APPENDIX A.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN L. CONNOLLY, et al., etc., Appellees,	)	
	)	No. 76-2777
vs.	)	
	)	OPINION
PENSION BENEFIT GUARANTY CORPORATION, etc., Appellant.	)	

On Appeal from the United States District Court for the Central District of California.

Filed: May 4, 1978. Entered: May 9, 1978.

Before ELY and MERRILL, Circuit Judges, and HARPER, Senior District Judge.*

HARPER, Senior District Judge.

This is an appeal by the Pension Benefit Guaranty Corporation (hereinafter referred to as PBGC) from a summary judgment entered in favor of the Board of Trustees of the Operating Engineers Pension Trust (Trustees) which exempted the Operating Engineers Pension Plan (Plan) from coverage under the insurance provisions of Title IV of the Employee Retirement Income Security Act of 1974, 29 USC 1001 et seq. (ERISA or Act).

Federal jurisdiction over this action exists pursuant to 29 USC 1303(f).

On December 1, 1974, the Trustees paid a termination insurance premium of $12,043.00 to the PBGC. On April 10, 1975, the Trustees applied to the PBGC for a determination that the Plan was a defined contribution plan exempt from coverage under the insur-

*The Honorable Roy W. Harper, Senior United States District Judge for the Eastern District of Missouri, sitting by designation.

ance provisions contained in Title IV of the Act, 29 USC 1301 et seq. The PBGC informed the Trustees that the Plan was a defined benefit plan subject to the plan termination insurance coverage. Thereafter, the Trustees made a demand for return of their termination insurance premium, which was refused by PBGC.

On June 17, 1975, the Trustees filed a complaint in the district court for a declaratory judgment, damages and injunctive relief against the PBGC, challenging its determination that the Plan was a defined benefit plan subject to insurance coverage. Upon cross motions for summary judgment, the district court granted summary judgment in favor of the Trustees. *Connolly v. Pension Benefit Guaranty Corp.*, 419 F. Supp. 737 (C.D. Calif. 1976). In its order the district court declared the Plan to be a defined contribution plan exempt from insurance coverage under the Act, enjoined the PBGC from acting inconsistently therewith, and required the PBGC to return the Trustees' premium payment. *Connolly v. PBGC, supra* at 741-42. This appeal followed.

Initially it should be noted that the determination of the PBGC herein is entitled to great deference in the construction and application of ERISA. *Griggs v. Duke Power Co.*, 401 U.S. 424, 433-34 (1971). In *General Electric v. Gilbert*, 429 U. S. 125, 141-42 (1976), quoting from *Skidmore v. Swift & Co.*, 323 U. S. 134, 140 (1940), the Supreme Court stated:

> " 'We consider that the rulings, interpretations and opinions of the Administrator under this Act, while not controlling upon the courts by reason of their authority do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.' "

The Operating Engineers Pension Trust is a joint-labor-management trust established in conformance with §302(c)(5) of the Labor Management Relations Act of 1947, as amended in 1959, 29 USC 186(c)(5). This trust was created in 1960 by agreement between eleven home builders associations and the International Union of Operating Engineers. The trust agreement created the multiemployer pension plan at issue here. The Plan is a tax qualified employee pension plan within the meaning of §4021(a)(2) of ERISA, 29 USC 1321 (a)(2). It is administered by a fourteen-member Board of Trustees appointed in equal part by the employers and the union. The individual plaintiffs are the trustees of the trust. The purpose of the trust is to create a pension fund to which a number of employers make contributions and from which their employees may draw benefits when they reach a stated age of retirement.

Under the pension trust, the employers periodically enter into collective bargaining agreements to establish the amount of their contribution to the Plan. In fulfillment of their obligation under those agreements, the employers contribute a certain amount of money to the Plan each month. The amount contributed by each employer is determined by multiplying their employees' hours of service by a rate specified in the current agreement.

The monthly amount of the pension payable to an eligible participant is determined by multiplying the

Pension Factor in the Plan by the employee's Pension Credits and Prior Service Credits. The Pension Factor is an actuarial tool, calculated to translate plan experience into retirement benefits. In setting the Pension Factor, the Trustees take into account the investment income, gains and losses, expenses, any forfeitures by participants, the mortality experience of the Plan and any variance between actual and anticipated employer contributions and delinquencies. The Pension Factor is periodically revised by the Trustees.

The Pension Credit is a service-related formula determined in part by the amount of time spent on the job by the participant. The Plan also provides for some participants to be entitled to Prior Service Credits, for time spent on the job prior to the execution of this trust and Plan. Pension Credits are earned even if the employer fails to contribute the full amount of his obligation. The employee receives the appropriate pension benefit, as calculated by the above described formula, even though sufficient contributions have not been made on his behalf by his employer to the Plan.

By the express terms of the Plan, the employer's sole obligation to the pension fund is to pay such contributions as required by the collective bargaining agreements. The trust agreement clearly states that the employer's obligation for pension benefits to the employee is ended when the employer pays the appropriate contribution to the fund. This is true even though the contributions agreed upon are insufficient to pay the benefits under the Plan.

ERISA is the product of several years of legislative effort to improve the American pension system. ERISA is a complex piece of legislation which addresses itself

to many problems. One of the foremost concerns of Congress in enacting the Act was to assure workers that retirement benefits would be available when needed. 29 USC 1001(a), (c) provides:

> "The Congress finds that . . . owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to requisite funds to pay promised benefits may be endangered; that owing to the termination of plans before adequate funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits . . .
>
> "It is hereby further declared to be the policy of this Chapter to protect . . . the interests of participants in private pension plans and their beneficiaries by improving the equitable character and the soundness of such plans by requiring them to . . . meet minimum standards of funding, and by requiring plan termination insurance."

Consistent with ERISA's remedial function, Congress sought to effectuate the purpose of the Act as far as possible. In a report accompanying an earlier version of the bill, the Senate Committee on Labor and Public Welfare stated:

> "It is intended that coverage under the Act be construed liberally to provide the maximum degree of protection to working men and women covered by private retirement programs. Conversely, exemptions should be confined to their narrow purpose."

S. Rep. No. 93-127, 93d Cong., 1st Sess. 18 (1973).

The issue before the Court is whether the Plan is a defined benefit plan under 29 USC 1002(35) or an individual account or defined contribution plan

under 29 USC 1002(34). If the Plan is a defined benefit plan, it is covered by the termination insurance provisions of the Act. If it is an individual account or defined contribution plan it is not covered by the termination insurance provisions, 29 USC 1321(b)(1), unless the Plan is a "plan under which a fixed benefit is promised if the employer or his representative participated in the determination of that benefit." 29 USC 1321(c)(1). By definition, any plan that is not an individual account or defined contribution plan, must necessarily be a defined benefit plan. 29 USC 1002 (35).

The district court ruled that the Plan is a defined contribution plan, not subject to termination insurance coverage under ERISA. This determination is erroneous.

In its decision the district court looked to the obligation which the employers participating in the Plan have contractually agreed to assume. Because the employers have agreed only to make specified contributions, and have disclaimed any obligation to pay any pension benefit, the district court held that the plan was a defined contribution plan under which no fixed benefit is promised. The district court reached its conclusion by considering that to subject the Plan to ERISA's termination insurance provisions would force upon the employer a greater obligation and liability than he had originally agreed to in his contract. *Connolly v. PBGC*, 419 F. Supp. at 740.

However, this is precisely what the termination insurance provisions of the Act were intended to do. Whenever the PBGC pays pension benefits to participants of defined benefit plans which have terminated with

insufficient assets to pay the benefits promised, (29 USC 1322), the PBGC is entitled to recover the amount of such benefits from the employers who maintained the terminated pension plan, up to an amount not exceeding thirty percent of the net worth of each employer involved. 29 USC 1362-1368. The precise intent of these sections was to impose substantial, new, and in some cases retroactive liabilities upon the contributing employers of the plan.

29 USC 1321(b) provides that termination insurance coverage does not extend to any plan,

> "(1) which is an individual account plan, as defined in paragraph (34) of section 1002 of this title . . ."

29 USC 1002(34) provides:

> "The term 'individual account plan' or 'defined contribution plan' means a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account."

The statutory definition of an individual account or defined contribution plan contains two requirements. The first requirement is that a plan must provide for an individual account for each participant. The second requirement is that a participant's benefit must be based solely on the amount in his account. Neither of these requirements is satisfied by the Plan. The Plan does not provide for an individual account for each participant. Contributions on behalf of participants

are pooled in a general fund. While a record of contributions received on behalf of a participant is maintained by the Trustees, the participant has no right, title, or interest in these amounts. Under the structure of the Plan, no purpose is served in providing an individual account for each participant. The amount of a participant's benefit at retirement is not based on the amount of contributions paid on his behalf into an account. Rather the benefit is determined by a service related formula, Pension Credits plus Prior Service Credits multiplied by the Pension Factor. The participant is entitled to receive that amount even though a sufficient amount of contributions has not been made on the participant's behalf.

The legislative history of ERISA clearly demonstrates that the primary purpose for termination insurance is to insure the payment of benefits in the event a plan terminates before it is fully funded. Legislative History of the Employee Retirement Income Security Act of 1974, at 213, 1830-31, 1865-72, 2361, 3371, 3373, 4802 (1976) (hereinafter cited as *Legis. Hist.*)

> "The termination insurance program is intended to work hand-in-hand with the minimum funding standards imposed by the bill, since the latter will limit the losses due to plan termination by requiring more adequate funding of pension plans.

Legis. Hist. at 1094.

In the case of a true individual account plan, there is no possibility that the plan would terminate while being underfunded. Under such a plan, a separate account is kept for each covered employee, and the employee's accrued benefit at all times is simply "the balance of the individual's account." 29 USC 1002(23)(b). Thus by definition, an individual account plan

can never be underfunded. Consequently, the funding provisions of ERISA, subject to certain exceptions, do not apply to such a plan. 29 USC 1081(a)(8). Individual account plans are excluded from ERISA's funding rules because these plans do not specify any benefit beyond the balance of each individual's account at the time it is disbursed.

For a similar reason, an individual account plan is also excluded from termination insurance coverage. 29 USC 1321(b)(1). Congress concluded that in the case of a true individual account plan there was no need for termination insurance, just as there was no need for rules as to the funding of such an account. Since the participant is merely entitled to benefits determined by his own account, there is no unfunded amount to insure. *Legis. Hist.* at 1149.

Defined benefit plans, on the other hand, are subject to being underfunded for a variety of reasons because the benefits are not defined as the eventual balance in the individual's account. A defined benefit plan may provide benefits for service prior to the inception of the plan. In such a case, these prior service benefits need not be funded immediately, but may be amortized over thirty or forty years. 29 USC 1082(b)(B). As stated earlier, the Plan at issue provides for benefits for service prior to the inception of the plan, and the Plan is presently underfunded because *inter alia* of these promised benefits.

A funding deficiency in the Plan may also occur when the Trustees, through the use of the Pension Factor, establish pension benefits in excess of the amount of contributions received during the term of the collective bargaining agreement. Under the type

of plan involved herein, if actuarial assumptions and calculations used in establishing the Pension Factor are correct as of the beginning of the term of the collective bargaining agreement, and the agreed upon employer contributions are adequate and paid when required, there would be no funding deficiency by reason of miscalculation during the term of the collective bargaining agreement. However, when anticipated contributions, relied upon in establishing benefits, exceed actual contributions unfunded liability may occur.

The risk of termination of a multiemployer Taft-Hartley pension plan, such as the plan before the Court, is significantly less than in a single employer plan, because of its larger economic base. Indeed, an effort was made to exempt multiemployer plans from funding and/or termination insurance because of their relatively remote likelihood of termination. However, these proposals for outright exemption of multiemployer plans were rejected. Collectively bargained multiemployer plans were not exempted from the requirement that unfunded past service liability be amortized. Rather, such plans were granted an additional ten years beyond the standard thirty-year period within which to amortize the unfunded past service liability. 29 USC 1082(b)(2)(B).

> "This recognizes that multiemployer plans generally have an added element of financial strength in that their contributions come from a number of employers who as a group are less likely than comparable single employers to experience business difficulties."

Legis. Hist. at 3317.

Recognition of the financial strength of a multiemployer plan is also contained in ERISA's insurance program. With respect to termination insurance, the statutory multiemployer plan premiums were established at one-half the rate for single employer plans. 29 USC 1306(a)(3)(B). The multiemployer plan's lower risk of termination was apparently sufficient to justify a different premium rate; however, it was not sufficient to warrant total exemption from termination insurance coverage.

> "In view of the relatively minor incidence of multiemployer plan terminations the conferees determined to delay mandatory coverage of multiemployer plan terminations until January 1, 1978, but to commence premium payments by such plan as of date of enactment to build up reserves in the event the Pension Benefit Guaranty Corporation extends discretionary coverage prior to that date. It is to be expected that this discretionary coverage will be extended fully to protect employees benefits in multiemployer plans.
>
> "The conferees had no intention whatsoever of treating workers in these plans as 'second-class citizens' and are determined that benefits be fully protected to the statutory limits regardless of the type of plan involved."

Legis. Hist. at 4767.

The district court also held that 29 USC 1321(c)(1) was applicable to the Plan. 29 USC 1321(c)(1) provides:

> "For purposes of subsection (b)(1) of this section, the term 'individual account plan' does not include a plan under which a fixed benefit

is promised if the employer or his representative participated in the determination of that benefit."

The district court reasoned that the independent fiduciary duties of the Trustees necessarily precluded any characterization of the Trustees as employer representatives participating in the determination of pension benefits. *Connolly v. PBGC*, supra at 741.

In light of this Court's determination that the plan is not an individual account plan, and thus not exempt from termination insurance under 29 USC 1321(b)(1), we do not reach the issue of whether 29 USC 1321(c)(1) is applicable to the case at bar.

The district court's decision to proceed with the statutory construction issue without convening a three-judge court was permissible. See *Hagans v. Lavine*, 415 U. S. 528, 543-44 (1974).

The constitutional issues sought to be raised by the plaintiffs were not reached in the district court, and thus not properly before this Court. At this time, the Court makes no ruling with respect to any constitutional issues which the parties may wish to present on remand. Generally, a reviewing Court should remand a case to the district court for consideration of a question not previously considered there. *Boire v. Miami Herald Publishing Co.*, 343 F. 2d 17, 25 (5th Cir.) *cert. denied* 382 U. S. 824 (1965). This Court holds only that: The Plan involved herein is not an individual account plan as defined by 29 USC 1002(34) and thus not exempt from the termination insurance program under 29 USC 1321(b)(1); and that the employer's disclaimer of liability for the payment of benefits does not convert the Plan into an individual account plan.

Accordingly, this case is Reversed and Remanded.

APPENDIX B.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOHN J. CONNOLLY, et al., etc.,
Appellees,

vs.

PENSION BENEFIT GUARANTY CORPORATION, etc.,
Appellant.

No. 76-2777

ORDER

Filed: Sept. 6, 1978. Entered: Sept. 8, 1978.

Before: MERRILL and ELY, Circuit Judges, and HARPER, District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing. Judge Ely has voted to reject the suggestion for a rehearing in banc and Judges Merrill and Harper have recommended such rejection.

The full court has been advised of the suggestion for an in banc hearing, and no judge of the court has requested a vote on the suggestion for rehearing in banc. Fed.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing in banc is rejected.

APPENDIX C.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

JOHN L. CONNOLLY, *et al.*, each in his respective capacity as Trustee of the Operating Engineers Pension Trust, Plaintiffs, vs. PENSION BENEFIT GUARANTY CORPORATION, a non-profit corporation established within the Department of Labor of the United States of America, Defendant.	)	No. CV 75-2027-DWW ORDER GRANTING SUMMARY JUDGMENT

Entered: Feb. 12, 1976.

The Operating Engineers Pension Trust is a joint labor-management trust created in conformance with § 302(c)(5) of the Labor-Management Relations Act of 1947, as amended in 1959 (29 U.S.C. § 186(c)(5). It was created in 1960 by a written agreement to which several contractors associations and home builders associations were signatories as employers and the international union of operating engineers, local union No. 12, as the organization representing the employees. The individual plaintiffs are trustees of the trust who have the power to administer the Pension Fund and

to administer and maintain the Pension Plan which is the subject of the trust. The purpose of the trust is to create a pension fund to which a number of employers make contributions and from which employees may draw benefits when they reach a stated age of retirement.

Congress has concerned itself over the years with the problem of employee pension funds which have terminated with financial shortages resulting in an inability of many employees to receive expected benefits upon retirement. A recent Congressional effort to bring about a cure for this problem has resulted in the enactment of the Employee Retirement Income Security Act of 1974 (ERISA). Generally, this act seeks to protect the well-being and security of the millions of employees and their dependents who are affected by benefit plans. It seeks to set safeguards for the operation of plans and to establish standards for the administration of pensions in order to minimize terminations of plans and losses to beneficiaries. Section 4002 of the Act establishes within the Department of Labor a corporate body to be known as the Pension Benefit Guaranty Corporation and its purpose is to encourage the continuation and maintenance of voluntary private pension plans so as to provide for timely and uninterrupted payment of benefits to participants. Section 4005 of the Act establishes four revolving funds which are intended to serve as insurance against the failure of the particular types of pension funds which this part

of ERISA is designed to cover. The corporation is empowered to prescribe insurance premium rates which it assesses against certain employers to guarantee that the pension funds created by those employers will not suffer short-fall. In the event of a termination of a pension plan of this type, the employer could be held liable for shortages in the fund up to 30% of the net worth of the employer's business. 29 U.S.C. § 1362 (a) and (b). Not all types of pension plans are intended to be covered under the insurance provisions of ERISA. Section 4021(b) of the Act provides as follows:

> "(b) This section does not apply to any plan—(1) which is an individual account plan, as defined in paragraph (34) of Section 1002 of this title."

Paragraph (34) of Section 3 of the Act provides as follows:

> "The term 'individual account plan' or 'defined contribution plan' means a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account, and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account."

Also, Section 4021(c)(1) of the Act provides as follows:

> "For purposes of subsection (b)(1) of this section, the term 'individual account plan' does not include a plan under which a fixed benefit is promised if the employer or his representative participated in the determination of that benefit."

Plaintiff trustees administer a pension fund for the benefit of employees within the building industry. Defendant Pension Benefit Guaranty Corporation has taken the position that the type of pension administered by plaintiff trustees is covered by the insurance provisions of ERISA and the corporation compelled plaintiff trustees to pay a premium of $12,043 into its guaranty fund. The plaintiffs contend that their pension fund comes within the exceptions set forth in paragraph (34) of Section 3 of the Act and that they are not covered by the insurance provisions. If plaintiffs' fund is not included within the exceptions just noted, the trustees would also be limited by provisions of ERISA as to the manner in which they could administer the fund over which they are trustees. Additionally, employers who contribute to plaintiffs' fund would be subject to the liability provisions of ERISA in the event of a termination of the plan.

In short, plaintiffs contend that its plan is an "individual account plan" or "defined contribution plan" as referred to in 29 U.S.C. § 1002(34) while the defendant corporation contends that plaintiffs' plan is a "defined benefit plan" as defined in Section 1002(35) and is therefore covered. Plaintiffs' trustees communicated their objections to the defendant corporation upon being required to pay premiums into the corporation's Guaranty Fund, but defendant's legal staff concluded that the Operating Engineers Pension Trust is a Defined Benefit Plan for the purposes of Section 4021(b)(1) because plaintiffs' method of computing a participant's pension benefit appeared to be a formula based on service and therefore within the class of plans called defined benefit plans rather than an individual account plan. In this litigation, which seeks to have this Court

determine whether plaintiffs' plan comes within the exceptions of Section 4021(b), the defendant urges that since it is the agency charged with enforcing ERISA, its determination of coverage should be given more weight than that reached by plaintiff trustees. *Griggs v. Duke Power Co.*, 401 U.S. 424, 434, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971).

AGREEMENT ESTABLISHING THE OPERATING ENGINEER'S PENSION TRUST

The 1960 agreement which established the trust administered by plaintiffs (hereinafter called the "Trust Agreement") provided that each collective bargaining agreement between the union and the employers would bind the employers to abide by the Trust Agreement and to pay a stated amount into the trust with respect to each hour worked by each employee covered by the collective bargaining agreement. Article II, Section 7 of the Trust Agreement provides as follows:

> "Neither the Employers nor any Signatory Association, or officer, agent, employee or committee member of the Employers or any Signatory Association, shall be liable to make Contributions to the Fund or be under any other liability to the Fund or with respect to the Pension Plan, except to the extent that he or it may be an Individual Employer required to make Contributions to the Fund with respect to his or its own individual or joint venture operations, or to the extent he or it may incur liability as a Trustee as hereinafter provided. Except as provided in Article III hereof, the liability of any Individual Employer to the Fund, or with respect to the Pension Plan, shall

> be limited to the payments required by the Collective Bargaining Agreements with respect to his or its individual or joint venture operations, and in no event shall he or it be liable or responsible for any portion of the Contributions due from other Individual Employers or with respect to the operations of such Individual Employers. The Individual Employers shall not be required to make any further payments or Contributions to the cost of operations of the Fund or of the Pension Plan, except as may hereinafter provided in the Collective Bargaining Agreements."

Article VII, Section 4 of the Plan provides as follows:

> "This Pension Plan has been adopted on the basis of an actuarial calculation which has established, to the extent possible, that the contributions will, if continued, be sufficient to maintain the Plan on a permanent basis. However, it is recognized that the benefits provided by this Pension Plan can be paid only to the extent that the Plan has available adequate resources for those payments. No Individual Employer has any liability, directly or indirectly to provide the benefits established by this Plan beyond the obligation of the Individual Employer to make contributions as stipulated in any Collective Bargaining Agreement. In the event that at any time the Pension Fund does not have sufficient assets to permit continued payments under this Pension Plan, nothing contained in this Pension Plan and the Trust Agreement shall be construed as obligating any Individual Employer to make benefit payments or contributions (other than the contributions for which the Individual Employer may be obligated by any

Collective Bargaining Agreement) in order to provide for the benefits established by the Pension Plan. Likewise, there shall be no liability upon the Board of Trustees, individually or collectively, or upon the Employers, Signatory Association, Individual Employer, or Union to provide the benefits established by this Plan if the Pension Fund does not have the assets to make such benefit payments."

Article VIII, Section 2 of the Plan provides:

"This Plan has been adopted on the basis of an actuarial estimate which has established (to the fullest extent possible) that the income and accruals of the Fund will be fully sufficient to support this benefit plan on a permanent basis. However, it is recognized as possible that in the future the income or the liabilities of the Fund may be substantially different from those previously anticipated. It is understood that this Pension Plan can be fulfilled only to the extent that the Fund has assets available from which to make payments. Consequently, the Board of Trustees may have prepared annually an Annual Actuarial Evaluation of the Fund and shall take the actuarial status of the Fund into account in determining amendment or modification of this Pension Plan."

FORMULA FOR FIXING PENSION AMOUNT

The monthly amount of the pension payable to a participant who is eligible for a pension in plaintiffs' plan is determined by multiplying the numbers of his respective Prior Service Credits and Pension Credits accumulated by the appropriate Pension Factor. The

Plan provides for some participants to be entitled to Prior Service Credits. It also provides for certain participants to receive Pension Credits pursuant to a prescribed formula. The Pension Factor used to determine the benefit entitlement of participants is fixed from time to time. In setting the Pension Factor, the trustees take into account the investment income, gains and losses, expenses, any forfeitures by participants, the mortality experience of the Plan and the actual anticipated employer contributions and delinquencies.

EMPLOYER CONTRIBUTIONS

Under the Pension Trust created by its signatories in 1960 the various employers would enter into collective bargaining agreements from time to time with the union. As a part of the terms of that agreement the employer obligated himself to make certain contributions into the trust fund for each of his employees, measured by the number of hours worked and any Prior Service Credits or Pension Credits to which the employee would be entitled. The amount the employer is obligated to contribute to the fund may change from time to time. This comes about because the trustees of the Plan are authorized annually to have prepared an actuarial evaluation of the fund which shall consider the actuarial status of the fund and this is taken into account in determining which amendments or modifications shall be made to the Pension Plan. If it appears from the actuarial report that the fund is in peril, the trustees have the power at a given period to compel such additional contributions into the fund from the employers as should preserve the integrity of the fund.

By its terms as quoted hereinbefore, the Plan assures the employer that his sole obligation to the fund is to pay such contributions for each employee as from time to time the plaintiff trustees shall determine is appropriate. The agreement states in clear and concise language not subject to any ambiguity that the employers obligation to the employee for pension benefits is ended when he pays the appropriate contribution into the fund. In no way does the employer under the structure of this agreement promise the employee a defined pension benefit. Rather, it is clear that he only promises that he will pay into the fund each pay period the contribution that is prescribed by the trustees and that his obligation to the fund is then ended.

In negotiating a collective bargaining agreement there is the possibility that a union could make a demand upon an employer to extend to the employee a defined pension benefit, but such has not been done in the contract under review. In the negotiations that attended this agreement the employer demanded that his obligation be ended once he made a contribution to the individual account of the employee and the union accepted the provision. To interpret this carefully constructed agreement as not coming within the exceptions of Section 1002(34) is to force upon the employer a greater obligation and liability than he had agreed to in his contract.

Defendant argues strenuously that plaintiffs' plan is covered by the insurance provisions of ERISA because it is not a true "individual account plan" as defined by Section 1002(34). That section defines an individual account plan as a plan which provides

for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account and any income, expenses, gains and losses, and any forfeitures of accounts of other participants which may be allocated to such participant's account. Defendant states that because the contributions of the employer to the individual's account is not maintained precisely like the concept of one's savings account in a bank, but instead the money is pooled by the trustees for investment purposes, and because of the computerized method employed by the trustees in reckoning the accumulated amounts contributed to the individual's account from time to time, this destroys proper characterization of the plan as an "individual account plan" or "defined contribution plan." The legislation which must guide the consideration of this dispute is lengthy and complex and represents draftsmanship that is confusing, to say the least, but a fair reading of the Act and the legislative history which preceded the enactment leads me to conclude that the structure of plaintiffs' plan properly comes within the exceptions of Section 1002 and should be characterized as an individual account plan.

Defendant claims that plaintiffs' plan does not come within Section 1002(34) because an "individual account plan" is one which provides for an individual account for each participant and for benefits based *solely* upon the amount contributed to the participant's account, and any income, expenses, gains or losses, and any forfeitures of accounts of other participants which may be allocated to each participant's account. Defendant argues that in the instant plan, benefits are not based solely upon the amount contributed to each participant's account because a part of the retire-

ment benefit is based on past service. The parties stipulate that a participant is entitled to a pension benefit which is determined by multiplying his "Prior Service Credits" by the current "Pension Factor." An employee earns one Prior Service Credit (up to 20) for each year of covered service in the industry prior to the establishment of the plan by the 1960 agreement.

Moreover, defendant argues, the plan provides for a monthly benefit determined by multiplying each "Pension Credit" by the appropriate "Pension Factor." A "Pension Credit" is earned whenever a participant works a given number of hours. The retirement benefits payable to a participant are based directly upon the number of hours worked by the employee and the applicable rate of contributions as reflected in his accumulated Pension Credits, as well as Prior Service Credits.

Moreover, PBGC argues that there is another reason for concluding plaintiffs' plan to be a covered plan. Section 4021(c)(1) of the Act, 29 U.S.C. § 1321(c)(1) provides as follows:

> "For purposes of subsection (b)(1) of this section, the term 'individual account plan' does not include a plan under which a fixed benefit is promised if the employer or his representative participated in the determination of that benefit."

Defendant argues that employer representatives participated in the determination of the benefit in plaintiffs' plan.

As I see it, the employer is signatory to an agreement which sets up a joint labor-management trust which has a Board of Trustees. The Trust binds the employer to pay a stated amount to the Trust for each employee covered by the collective bargaining

agreement. The trustees are the ones who made a determination of the benefits, and this scheme includes no such participation on the part of the employer as is intended in Section 4021(c)(1) of the Act.

I conclude that plaintiffs' plan is a defined contribution plan under which no fixed benefit is promised; that it comes within the exception stated in 29 U.S.C. § 1321(b)(1) and that plaintiffs are entitled to summary judgment. The Court further finds that defendant should be required to return to plaintiff the sum of $12,043 plus interest thereon from the date said sum was paid to defendant and that defendant, its agents, employees and representatives are enjoined from acting in any manner inconsistent with the judgment of this Court as set forth in this memorandum which, pursuant to Rule 52(a) FRCP shall take the place of findings of fact and conclusions of law.

DATED: This 12th day of February, 1976.

/s/ David W. Williams
DAVID W. WILLIAMS,
United States District Judge

No. 78-877

In the Supreme Court of the United States

OCTOBER TERM, 1978

JOHN L. CONNOLLY, ET AL., PETITIONERS

v.

PENSION BENEFIT GUARANTY CORPORATION, ETC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 581 F. 2d 729. The opinion of the district court (Pet. App. 14c-25c) is reported at 419 F. Supp. 737.

JURISDICTION

The judgment of the court of appeals was entered on May 9, 1978. A petition for rehearing was denied on September 8, 1978 (Pet. App. 13b). The petition for a writ of certiorari was filed on December 1, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the Operating Engineers Pension Trust is a "defined benefit plan" covered by the pension plan termination insurance program of the Employee Retirement Income Security Act of 1974.

STATEMENT

Petitioners are the trustees of the Operating Engineers Pension Trust (Pension Trust), a joint labor-management trust established under Section 302(c)(5) of the Labor Management Relations Act, 29 U.S.C. 186(c)(5), to administer the Operating Engineers Pension Plan (Plan) (R. 30). Seven trustees are appointed by associations of employers in the construction industry and seven are appointed by Local Union No. 12 of the International Union of Operating Engineers (Union) (R. 48).

Employers contributing to the Pension Trust periodically enter into collective bargaining agreements with the Union. Those agreements provide, *inter alia*, that the employers will contribute to the Pension Trust an amount calculated by multiplying the number of hours each employee works by a specified hourly rate (R. 30-31).

The Plan provides that, on retirement, a participant is entitled to a monthly pension benefit calculated by multiplying the number of years worked by a "pension factor," expressed as a dollar amount (R. 34-39). Under the terms of the Plan, the trustees periodically revise the pension factor based on an actual evaluation of various circumstances that affect the financial soundness of the Pension Trust, such as investment performance and employee turnover and mortality (R. 41).

Respondent is a government corporation established under Title IV of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. 1301 *et seq.*, to administer a program of pension plan termination insurance. Respondent guarantees payment of pension benefits in "defined benefit" pension plans that terminate with insufficient funds to pay the guaranteed benefits. 29 U.S.C. 1321 and 1322. A defined benefit plan is "a pension plan other than an individual account plan * * *." 29 U.S.C. 1002(35). An "individual account plan"

(also known as a "defined contribution plan") is a pension plan that "provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account * * *." 29 U.S.C. 1002(34). Respondent does not insure "individual account" plans. 29 U.S.C. 1321. Respondent's insurance program is financed primarily by the payment of insurances premiums by covered plans. For multi-employer plans such as the Plan here, the annual premium is 50 cents for each participant in the plan. 29 U.S.C. 1306(a)(3)(B).

On December 1, 1974, petitioners paid to respondent a termination insurance premium of $12,043 (Pet. App. 1a).[1] On April 10, 1975, they applied to respondent for a determination that the Plan was a defined contribution plan and thus exempt from the termination insurance program (Pet. App. 1a-2a). Respondent informed petitioners that the Plan was a defined benefit plan subject to the termination insurance program and denied petitioners' request for a refund of the premium (Pet. App. 2a).

Petitioners then brought this suit in the United States District Court for the Central District of California, seeking a declaratory judgment that the Plan was a defined contribution plan. On cross-motions for summary judgment based on stipulated facts, the district court granted petitioners' motion and ordered respondent to refund the premiums paid. The district court held that the Plan was not a defined benefit plan, reasoning (Pet. App. 22c):

> In no way does the employer under the structure of this agreement promise the employee a defined pension benefit. Rather, it is clear that he only

[1] Petitioners do not contend that this amount was improperly determined if they are subject to the termination insurance program.

> promises that he will pay into the fund each pay period the contribution that is prescribed by the trustees and that his obligation to the fund is then ended.

The court of appeals reversed. It concluded (Pet. App. 7a):

> The statutory definition of an individual account or defined contribution plan [in 29 U.S.C. 1002(34)] contains two requirements. The first requirement is that a plan must provide for an individual account for each participant. The second requirement is that a participant's benefit must be based solely on the amount in his account. Neither of these requirements is satisfied by the Plan.

The court of appeals also reasoned that there is "no possibility" that a defined contribution plan could terminate while underfunded, because the employee's accrued benefit "is simply 'the balance of the individual's account.' 29 U.S.C. 1002(23)(b). Thus by definition, an individual account plan can never be underfunded," and there is no reason to subject it to a termination insurance program. Pet. App. 8a-9a. The Pension Trust, on the other hand, "provides for benefits for service prior to the inception of the plan, and the Plan is presently underfunded because *inter alia* of these promised benefits" (*id.* at 9a).

ARGUMENT

The decision of the court of appeals is correct. It does not conflict with the decisions of this Court or any other court, and there is no reason to grant review of the first appellate decision to consider the matter.

1. The parties stipulated in the district court that (R. 40-41):

> A computer print-out of the information maintained on behalf of each participant shows the number of hours worked each month by an individual, the obligated monthly contribution to be made on behalf of an individual and the monthly accrual of an individual's Pension Credits. * * * It is not possible to determine the amount actually contributed on behalf of an individual participant from the computer print-out of the information maintained for each participant. No other information for the purpose of determining the amount of the pension benefit payable to an individual participant except for identifying information is maintained on an individual participant * * *.
>
> * * * *
>
> At no time either on the Work Sheet or on the Pension Application form is the amount actually contributed on behalf of a participant determined. A participant's benefit is paid regardless of whether the obligated contributions on his behalf are actually made, provided there are sufficient assets in the Fund.

The court of appeals was therefore correct in determining that the Plan has neither of the two attributes of a defined contribution plan within the meaning of 29 U.S.C. 1002(34): "an individual account for each participant and * * * benefits based solely upon the amount contributed to the participant's account * * *." See Pet. App. 7a. This makes the Plan a defined benefit plan because, under 29 U.S.C. 1002(35), any plan that is not an individual account plan is a defined benefit plan. And all defined benefit plans are subject to the termination insurance program by virtue of 29 U.S.C. 1321(a) and (b)(1).

2. Petitioners to the contrary (Pet. 6), the decision below does not conflict with *Alabama Power Co.* v. *Davis*, 431 U.S. 581 (1977). *Alabama Power* held that, under Section 9 of the Military Selective Service Act, 38 U.S.C. 2021, which guarantees veterans returning from military service the right to be restored to their former employment "without loss of seniority," a veteran is entitled to credit his time in the military as time on the job for purposes of determining his pension benefits. The Court's opinion mentions in passing that Alabama Power Company's pension plan is a defined benefit plan, rather than a defined contribution plan, because "the benefits to be received by employees are fixed and the employer's contribution is adjusted to whatever level is necessary to provide those benefits." *Alabama Power Co.* v. *Davis*, *supra*, 431 U.S. at 593 n.18.

Petitioners appear to argue (Pet. 6 and n.2) that, because the collective bargaining agreement between the employers and the Union promises a certain contribution to the trust fund for each employee and does not promise a certain benefit, then the Plan is not a defined benefit plan within the language from *Alabama Power*. This contention is incorrect. *Alabama Power*'s language simply does not support petitioner's apparent belief that a defined contribution plan is one in which the employer has promised a fixed contribution while a defined benefit plan is one in which he has promised a fixed benefit. The question is not what the employer has promised to pay to the fund but what the fund is obliged to pay to the participants. If the benefits are "based solely upon the amount contributed to the participant's account" (and each participant has an individual account) then the plan is a defined contribution plan; otherwise it is a defined benefit plan. 29 U.S.C. 1002(34), (35).[2] As this Court

[2]Petitioners likewise can find no support for their position in the legislative history of ERISA (Pet. 15-17). The "fine print" (Pet. 17) of the statutory definition of a defined contribution plan is not at all ambiguous, contrary to petitioners' assertion, so reference to the legislative history is unnecessary. There is no more merit to petitioner's discussion (Pet. 17-18) of administrative pronouncements regarding a particular type of defined contribution plan that is not involved in this case.

stated recently in describing a plan that, like this one, required the employer to contribute a fixed amount per employee man-week:

> Because the Fund made the same payments to each employee who qualified for a pension and retired at the same age, rather than establishing an individual account for each employee tied to the amount of employer contributions attributable to his period of service, the plan provided a "defined benefit." See 29 U.S.C. §1002(35); *Alabama Power Co.* v. *Davis*, *supra*, at 593 n.18.

International Brotherhood of Teamsters v. *Daniel*, No. 77-753 (Jan. 16, 1979), slip op. 2 n.3.

3. There is no merit to petitioners' contention (Pet. 9) that the court of appeals' decision deems the trustees to be the employers' representatives or agents and thus abrogrates the trustees' fiduciary obligations to the plan participants. To a certain extent, the corpus of the trust fund in any pension plan will reflect the trustees' investment decisions; if the trustees invest wisely, the corpus will grow and the employers may succeed, in future bargaining agreements, in reducing their contributions. Conversely, unwise investment decisions by the trustees may well result in union demands for increased employer contributions in the future. But the natural tension between what the employees want and what the employers are willing to provide has always been the stuff of collective bargaining, and this is as true of contributions to pension plans as it is of wages or other working conditions. See *Inland Steel Co.* v. *National*

Labor Relations Board, 170 F. 2d 247 (7th Cir. 1948), cert. denied, 336 U.S. 960 (1949). Trustees of a pension fund do not bargain with the employees and do not "promise" pension benefits as agents of the employer (Pet. 9). The obligation that ERISA imposes on defined benefit plans to pay premiums for termination insurance does not impinge on the trustees' fiduciary obligations or make them representatives or bargaining agents of the employer.[3]

4. Finally, petitioners contend that there will be a "mass exodus of employers from participation in multi-employer pension trusts" (Pet. 8) because of the liability that, the court of appeals held, ERISA imposes on those plans. But the court of appeals did no more than apply the law passed by Congress. If this will visit adverse economic effects on pension trust funds subject to the termination insurance program, petitioners' recourse is to Congress, not to this Court.

---

[3]In *Sheet Metal Workers' International Association*, 234 N.L.R.B. No. 162 (1978) and *United Mine Workers of America, Local 1854 (Amax Coal Co.)*, 238 N.L.R.B. No. 214 (1978), on which petitioners rely (Pet. 10-12), the National Labor Relations Board held that the trustees of a jointly administered multi-employer trust fund are solely fiduciaries, not collective bargaining representatives within the meaning of Section 8(b)(1)(B) of the National Labor Relations Act, 29 U.S.C. 158(b)(1)(B). The decision of the court of appeals does not convert the trustees into bargaining agents or abridge the right to strike recognized by *Sheet Metal Workers* and *Amax Coal Co., supra*. Petitioners' implication (Pet. 13-14) that the NLRB has imposed on the trustees an obligation to act both as fiduciaries and as Section 8(b)(1)B) representatives is erroneous; *Sheet Metal Workers* and *Amax Coal Co.* recognized the conflict that such a dual role would create and held that trustees are *not* Section 8(b)(1)(B) representatives.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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General Counsel

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Assistant General Counsel
Pension Benefit Guaranty Corporation

FEBRUARY 1979

DOJ-1979-02

IN THE

Supreme Court of the United States

October Term, 1978
No. 78-877

JOHN L. CONNOLLY, C. V. HOLDER, HOWARD C. DENNIS, JOHN C. MAXWELL, JAMES J. KIRST, C. WILLIAM BURKE, KENNETH J. BOURGUIGNON, JOSEPH H. SEYMOUR, RICHARD L. CORBIT, HAROLD EDWARDS, DONALD E. MIER, WILLIAM C. WAGGONER, RICHARD GANNON and ALFRED HARRISON, each in his respective capacity as Trustee of the OPERATING ENGINEERS PENSION TRUST,

Petitioners,

vs.

PENSION BENEFIT GUARANTY CORPORATION, a nonprofit corporation established within the Department of Labor of the United States of America,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

PETITIONERS' REPLY BRIEF.

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February 1979.

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PENSION BENEFIT GUARANTY CORPORATION, a nonprofit corporation established within the Department of Labor of the United States of America,

Respondent.

PETITIONERS' REPLY BRIEF.

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioners, the Trustees of the Operating Engineers Pension Trust, file this reply brief to address arguments first raised in the Brief for the Respondent in Opposition, Pension Benefit Guaranty Corporation ("PBGC"):

1. PBGC does not deny the foreseeable "mass exodus of employers from participation in multi-employer

pension trusts" arising from the Court of Appeals' interpretation of ERISA. (Op. Br., p. 8.) PBGC asserts, however, that the Trustees' only recourse is to Congress because any "adverse economic effects on pension trust funds" are attributable to "the law passed by Congress."

The Trustees are not so resigned to the inevitability of the interpretation of ERISA proposed by PBGC, and find little solace in blaming Congress for the foreseeable injury to the retirement security of millions of participants in multi-employer pension trusts. The petition has shown a logical alternative interpretation of the statute which maintains the stability of multi-employer pension trusts and which is supported by the traditional concept of a "defined contribution plan", by the legislative history of ERISA, and by current official pronouncements of the Department of Labor and the Department of the Treasury.

The most experienced and time-tested administrative agency is not entitled to the degree of judicial deference now claimed by PBGC. *International Brotherhood of Teamsters, etc. v. Daniel,* No. 77-753 (Jan. 16, 1979), Sl. Op., p. 14. Indeed, PBGC now contends (Op. Br., pp. 6-7, n. 2) that its own view of the statutory definition of "defined contribution plan" appearing at 29 U.S.C. § 1002(34) is so clear and unambiguous that "*reference to the legislative history is unnecessary.*" (Emphasis added.) This contention is both erroneous and remarkable, considering that nowhere in the opposing brief does PBGC set forth the entire statutory definition (Pet., p. 3), much less attempt to reconcile the various segments of the definition with its view that benefits from such a "pension plan" cannot amount to more than disbursement of a savings account. This Court's own recent efforts to distinguish between "defined contribution plan" and "defined benefit plan" reflect the lack of clarity in the statutory definition and well illustrate the very real need for resolution of this fundamental issue. *Cf., Alabama Power Company v. Davis,* 431 U.S. 581, 593, 97 S.Ct. 2002, 2009, n. 18 (1977), with *International Brotherhood of Teamsters, etc. v. Daniel, supra,* Sl. Op., p. 2, n. 3.

Showing due consideration of PBGC's views, the statutory interpretation issue presented by this case holds the potential for irreversible effects of the most serious consequence to multi-employer pension trusts and deserves careful judicial charting rather than administrative experimentation. Congress envisioned PBGC simply as an organization for providing insurance to reduce the risk that an employer which had promised its employees a "fixed benefit" at retirement would be unable to perform at the retirement date. Now PBGC views itself as having the power to dislodge the legal structure of existing multi-employer pension trusts in order to insure them, even at the expense of destruction of the trusts.

2. PBGC's quotation of the record stipulation regarding the manner in which an individual employee's benefits are computed by the Trustees at the time of retirement (Op. Br., p. 5) may create the erroneous impression that the Trustees do not maintain records of the amounts actually paid to the Trust by employers on behalf of each individual participant. As PBGC was well informed at the time the stipulation was drafted, and surely would concede now, the Trustees necessarily must and do maintain complete records accounting for the amounts owed and the amounts actually paid by each employer with respect to each individual employee participating in the Trust. The quoted stipulation

merely reflects the manner in which a particular computer printout provides information necessary to calculate the monthly pension benefit at retirement based upon provisions of the Plan. Thus, the Trustees do maintain "individual accounts" for each participant reflecting the precise basis for that participant's rights in the Plan in terms of contributions owed to the Plan, contributions received by the Plan, and assets of the Plan allocated to the participant according to rules of the Plan, albeit such an "individual account" is not in the nature of a "savings account" as envisioned by PBGC.

3. The Court of Appeals' decision makes participating employers liable for the cost of any benefits adopted or increased by the Trustees, and benefits described in the Plan (assuming the Plan is now regulated as a "defined benefit plan") can no longer be adjusted downward as expressly authorized by the Plan if the previous actuarial projections of the Trustees prove to have been too optimistic. [Act § 204(g), 88 Stat. 862, 29 U.S.C. § 1054(g).] In the district court, PBGC contended that the Trustees are viewed by ERISA as "representatives" of the employers for purposes of determining the level of benefits in the Plan (RA: 366, 380-81), and those Trustees' "promises" of benefits were the equitable basis of employer liability for the full cost of the benefits described.

Yet the opposing brief does not fairly address the realities shown by the petition that: (1) if the true measure of employer liability is to be the eventual cost of benefits adopted by the Trustees rather than the money payment fixed in the collective bargaining agreement, then the role of a trustee as an independent fiduciary will be compromised by employer efforts to

control trustee decisions; and, (2) indeed, § 8(b)(1)(B) of the National Labor Relations Act [61 Stat. 141, 29 U.S.C. § 158(b)] will guarantee the employer's right to choose and control any person who makes the employer's commitments regarding employee benefits.

Rather than confront these concerns, PBGC poses and disposes of several illusory premises, namely:

(a) That employer contingent liability is merely a concern for possible adverse investment results which may increase collective bargaining pressure for future "fixed contribution" rate increases. (Op. Br., p. 7.) (If the Plan is a "defined benefit plan" as decided by the Court of Appeals, employers would have contingent liabilities for benefits accrued during past and current employment, with additional costs varying according to investment results, the accuracy of actuarial predictions, and increases of benefits by the Trustees.)

(b) That imposing "defined benefit plan" status on the Plan merely requires payment of premiums to PBGC, which cannot possibly interfere with the Trustees' abilities to function as independent fiduciaries. (Op. Br., p. 8.) (The payment of premiums is no more than incidental to the change from "defined contribution plan" status. Adoption of benefits by the trustees of a "defined benefit plan" would be treated by ERISA as a "promise" of economic liability on behalf of the employers, and thereby create in fact an agency relationship between such trustees and the responsible employers.)

(c) That the Trustees contend "the NLRB has imposed on the trustees an obligation to act both as fiduciaries and § 8(b)(1)(B) representatives . . ." (Op. Br., p. 8, n. 3.) (In fact, the petition clearly states that the NLRB has regarded trustees of multi-employer benefit trusts as "solely independent fiduciaries" [Pet., pp. 10, 13-14] because such trustees have not had authority to enlarge the liabilities contracted for by employers who contribute to such trusts. Undoubtedly, the outcome of NLRB decisions on that issue would be critically affected by the Court of Appeals' view, advanced by PBGC, that ERISA makes employers liable for the costs of benefits adopted by trustees of multi-employer pension trusts.)

The Court of Appeals' decision was not considered or discussed by the NLRB in its recent decision of *United Mine Workers of America, Local 1854* (*Amax Coal Co.*), 238 N.L.R.B. No. 214, 99 LRRM 1670 (1978) and, therefore, the union right to strike to require employer participation in the trust was maintained in that case based upon the trustees' role as "solely fiduciaries" in performing their "discretionary functions in the internal administration of the trust . . . ." *Id.*, 99 LRRM at 1677.[1] The petition for review should be granted in order to assure that the union right to strike to require employer participation in a multiemployer pension trust as protected by the NLRB *Amax Coal Co.* decision will not be lost to the Trust and all similar trusts upon final disposition of this case.

[1]Reconciliation of the proper interpretation of ERISA with the pre-existing federal laws governing collective bargaining is a major facet of this case. In this regard, on January 17, 1979, PBGC made application to the Clerk of this Court for an

(This footnote is continued on next page)

Conclusion.

Based upon the foregoing and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

WAYNE JETT,
Counsel for Petitioners.

February 1979.

extension of time within which to file its opposing brief on grounds that the Solicitor General of the United States "has indicated that additional time is needed to consult with the National Labor Relations Board . . ." The Trustees respectfully note that the Solicitor General does not appear as counsel for the respondent on the opposing brief. Therefore, the views expressed by PBGC in the opposing brief apparently have not yet been reconciled with the views of other responsible federal agencies. The important and urgent task of construing ERISA in the light of collective bargaining laws remains to be accomplished by this Court through the granting of the petition for review.

IN THE

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OCTOBER TERM, 1978

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Petitioners,

v.

PENSION BENEFIT GUARANTY CORPORATION, a non-profit corporation established within the Department of Labor of the United States of America,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

AMICUS CURIAE BRIEF IN SUPPORT OF THE PETITIONERS

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---

AMICUS CURIAE BRIEF IN SUPPORT OF THE PETITIONERS

INTEREST OF THE AMICUS CURIAE *

Construction is the Nation's largest industry, accounting for over 200 billion dollars of the gross national product and employing in excess of 4.7 million workers. A large percentage of these workers are covered under some form of union sponsored retirement pension plan, *e.g.*, multiemployer plans. The construction industry accounts for over 50 percent of all multiemployer plans currently in existence and for over one-quarter of the participants in them.

Amicus Curiae, the Associated General Contractors of America (hereafter AGC), is a national trade association that represents the interest of employers within the construction industry. Its members include over 8,100 general construction contractors directly employing in excess of 1.6 million workers, and indirectly employing 3.5 million workers. Of the approximately 3,800 multiemployer pension plans in the construction industry, AGC members are contributors to over 1,800 plans that are similar to the plan in issue in this litigation.

Two studies of the Pension Benefit Guaranty Corporation (hereafter PBGC), dated July 1, 1978, and September 16, 1978, disclose that contrary to previous expectations, an alarmingly high percentage of multiemployer pension plans are experiencing funding deficiencies. The effect of the Court of Appeals' decision in this litigation imposing substantial, new, and in most cases retroactive liabilities upon contributing employers to these plans will have an adverse effect upon

* Written consent of the parties to the filing of this brief has been obtained pursuant to Rule 42(1) of the Supreme Court Rules.

and irreparably harm AGC members. The inevitable result will be substantial and additional plan fund deficiencies leading to withdrawals from and terminations of existing plans. Accordingly, AGC's interest in this litigation is acute.

QUESTION PRESENTED

Whether the Court of Appeals erred in refusing to construe a "defined contribution plan" in its historical and generic context?

RELEVANT STATUTES

The relevant provisions of the Employee Retirement Income Security Act of 1974 (88 Stat. 829, 29 U.S.C. § 1001 *et seq.*) are as follows:

Sec. 3. For purposes of this title:

* * *

(34) the term "individual account plan" or "defined contribution plan" means a pension plan which provides for an individual account for each participant and for benefits based solely upon the amount contributed to the participant's account. . . .

(35) The term "defined benefit plan" means a pension plan other than an individual account plan. . . .

* * *

(37)(A) The term "multiemployer plan" means a plan—

* * *

(iv) under which benefits are payable with respect to each participant without regard to the cessation of contributions by the employer who had employed that participant except to the extent that such benefits accrued as a result of service with the em-

ployer before such employer was required to contribute to such plan. . . .

Sec. 4021. (a) Except as provided in subsection (b), this section applies to any plan . . . .

* * *

(b) This section does not apply to any plan—

(1) which is an individual account plan, as defined in paragraph (34) of section 3 of this Act . . . .

RELEVANT PROVISIONS OF THE TRUST AGREEMENT

Article II

* * *

Section 4 . . . The Fund shall be administered by the Board of Trustees for the exclusive benefit of Employees and Retired Employees. . . .

* * *

Section 7 . . . [T]he liability of any Individual Employer . . . shall be limited to the payments required by the Collective Bargaining Agreements. . . .

Article IV

Section 1.(a) The Fund shall be administered by a Board of Trustees which shall consist of fourteen (14) Trustees. Seven (7) Trustees shall be appointed by the Union . . . and seven (7) Trustees shall be appointed by the Employers. . . .

Article V

* * *

Section 2. The Board of Trustees shall have . . . all powers reasonably necessary to maintain and operate the Plan. . . .

* * *

Section 5. Without limitation . . . the Board of Trustees shall have power:

* * *

(f) To invest . . . the assets of the Fund . . . except that no investment shall be made in the obligation or property of any Individual Employer. . . .

(g) To . . . procure insurance . . . to provide any or all of the benefits specified in the Pension Plans. . . .

* * *

(n) To maintain . . . bank accounts. . . .

* * *

Section 6. The Board of Trustees shall procure bonds for each Trustee . . . authorized to . . . deal with or draw upon the moneys in the Fund. . . .

Article VIII

* * *

Section 4. Neither the Employers, any Signatory Association, any Individual Employer . . . shall be responsible or liable for:

* * *

(b) The form validity, sufficiency, or effect of any plan, contract or policy for pension benefits. . . .

* * *

(d) The . . . investment of the Fund, or any portion thereof, or the disposition of any investment . . . or any loss or diminution of the Fund. . . .

Article IX

* * *

Section 2 . . . Neither the Employers, any Signatory Association, any Individual Employer . . . shall be liable for the failure or omission for any reason to pay any benefits under the Pension Plan.

HISTORY OF CASE

The District Court's decision, reported at 419 F.Supp. 737, construed the term "defined contribution plan" under the Employee Retirement Income Security Act of 1974 (hereafter ERISA), in its historical and generic meaning; i.e., since the Trust binds the contributing employers only to pay specified contributions, under which no fixed benefit is promised, it is a "defined contribution plan" within the meaning of § 3(34) and excluded from the termination insurance provisions of Title IV under § 4021(b)(1). 419 F.Supp. at 741.[1]

The Court of Appeals' decision, reported at 581 F.2d 729, reversed the District Court by holding that the Connolly Plan was not a "defined contribution plan" under § 3(34); therefore, it was subject to the termination provisions of Title IV, including the employer's

[1] In addition, the District Court ruled that § 4021(c)(1) was inapplicable to the Connolly Plan. That section provides that a "defined contribution plan" is covered by Title IV's termination insurance provisions if "a fixed benefit is promised [and] if the employer or his representative participated in the determination of that benefit." § 4021(c)(1). For the purposes of the Petition, since the Court of Appeals did not rule on this issue, the District Court's finding that § 4021(c)(1) is inapplicable should be presumed correct. Furthermore, the District Court's reason for the inapplicability of § 4021(c)(1)—the employer's lack of participation in the determination of benefits—is meritorious.

potential liability up to 30 percent of its net assets under § 4062. The Court adopted PBGC's literal construction of § 3(34). In total disregard of the historical and generic meaning, the Court concluded that under § 3(34), only those plans that provide for an individual account and benefits based solely on that account are defined contribution plans, regardless of the fact that the employers are contractually liable for only the specified contributions. 581 F.2d at 730. 733. Finally, the Court of Appeals concluded that Congress intended to impose "substantial, new, and in some cases retroactive liabilities upon contributing employers of the plan." 581 F.2d at 732.[2]

ARGUMENT

I.

THE COURT OF APPEALS ERRED IN NOT CONSTRUING A DEFINED CONTRIBUTION PLAN IN ITS HISTORICAL AND GENERIC CONTEXT

A. The Historical And Generic Meaning Of A Defined Contribution Plan Includes The Connolly Plan

Prior to the enactment of ERISA, a dichotomy had developed between defined benefit and defined contribution plans. Under a defined benefit plan, the partici-

[2] Before the District Court, Connolly raised substantial questions concerning claims of the unconstitutionality of ERISA under the due process clause of the Fifth Amendment. This Court need not reach any issue thereunder because the Court of Appeals remanded such questions to the District Court. 581 F.2d at 734. However, it would appear in light of this Court's decision in *Allied Structural Steel Co.* v. *Spannus*, —— U.S. ——, 98 S.Ct. 2716 (1978), concerning a state's private pension benefits' protection act and its retroactive application imposing substantial and severe impairment of contractual obligations as violative of Art. 1, § 10 of the *United States Constitution*, that there is substantial merit to Con-

pants were promised by the contributing employer a specified *benefit* and contributions were in the amount actuarially sufficient to provide the promised benefits. Any favorable performance of the fund's assets over and above the amount needed to pay the promised benefits redounded to the benefit of the employer. See Welch, *Investment for Management and Employment Benefit Trust—Waiver and Modification of the Prudent Man Rule,* 108 Trusts and Estates 350, 351 (1971); Note, *Fiduciary Standards and the Prudent Man Rule Under the Employee Retirement Income Security Act of 1974,* 88 Harvard Law Review 960, 977 (1975). Conversely, if the employer's contribution was insufficient to enable the fund to meet its liabilities as they became due, the employer was liable for the amount of benefits promised. *See e.g., International Union, United Automobile, Aerospace and Agricultural Implement Workers of America (UAW)* v. *Cardwell Manufacturing Company,* 416 F.Supp. 1267 (D. Kan. 1976); *Briggs* v. *Michigan Tool Company,* 369 F.Supp. 920 (E.D. Mich. 1974).

Under a defined contribution plan, which historically included such plans as target benefit, stock bonus, individual account, profit sharing, thrift, and money purchase, the employer's *contribution* was specified while the participant's ultimate pension benefit depended upon the rate of return. The employer's contribution was determined either by a flat sum or by a formula, based upon, *e.g.,* actuarial tables for service, with the ultimate distribution determined by the share of the

nolly's claims. In addition, there was substantial concern about this problem by Congress prior to the enactment of ERISA. See 1974 U.S. Code Congressional Administrative News at 4666-67.

fund's assets allocable to the retiring individual. The employer's liability to the defined contribution plan, however, was limited to the amount of the unpaid specified contributions in default. *See, e.g., Calhoun* v. *Bernard,* 369 F.2d 400 (9th Cir. 1966); *Brown* v. *Wilson & Co. Inc.,* 230 F.2d 280 (7th Cir. 1956); *Hann* v. *Harlow,* 271 F.Supp. 674 (D. Ore. 1967).

Under most multiemployer pension plans, including the Connolly Plan, all signatory employers specify certain contributions rather than promised benefits. These specified contributions were pooled into one fund. The reasons therefor are obvious: *e.g.,* a large number of participants under a plan; the necessity for the simplification of the administration of the trust accounts and the fund's assets by the independent trustees; and, the advantages for investment purposes of pooled funds rather than small individual investments from the funds in an individual account.

Under § 202(a)(2) of ERISA, one type of defined contribution plan is a "target benefit plan," as defined by the Secretary of Treasury. The Secretary of Treasury, one government agent administering ERISA, has continued to recognize the historical dichotomy between defined benefit and contribution plans in relation to multiemployer pension plans. In regulations under § 410 of the Internal Revenue Code, the Secretary describes a "target benefit plan" as a ". . . defined contribution plan under which the amount of employer contributions allocated to each participant is determined under a plan formula which does not allow employer discretion and on the basis of the amount necessary to provide a target benefit. . . ." IRC Reg. § 1.410 (a)-4; Treasury Decision 73-80. Likewise, the Secretary

of Labor, another government agent administering ERISA, has recognized that one type of a defined contribution plan is a "target benefit plan." *See* Form EBS-1 Plan Description and Instruction (1975). On December 12, 1978, regulations were published by the Secretary of Labor reflecting his current recognition that defined contribution plans do not require individual accounts for each participant.[3] Thus, the Connolly Plan, with fixed contributions by employers to a pooled fund which provides pension benefits to eligible participants, is characterized as a "target benefit plan."

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[3] These regulations are proposed interpretations of the 1978 amendments of the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621 *et seq.* 43 Fed. Reg. 58150-151 (1978), 29 C.F.R. §§ 850.17(e)(2)(i)(A) and (B) (1978):

> (i) *Defined contribution plans.*
>
> (A) *Separate accounts maintained.* If a separate account is maintained with respect to an employee's contributions and all income, expenses, gains and losses attributable thereto, the balance in such an account represents the amount attributable to employee contributions.
>
> (B) *Separate accounts not maintained.* If a separate account is not maintained with respect to an employee's contributions and the income, expenses, gains and losses attributable thereto, the proportion of the total benefit attributable to employee contributions is determined by multiplying that benefit by a fraction—
>
> (1) The numerator of which is the total amount of the employee's contributions under the plan (less withdrawals), and
>
> (2) The denominator of which is the sum of the numerator and the total contributions made under the plan by the employer on behalf of the employee (less withdrawals).

B. Congress' Intent In Passing ERISA Was Not To Alter The Historic And Generic Meaning Of A Defined Contribution Plan

The legislative history of ERISA involved numerous committee reports and revisions from both houses prior to ERISA's enactment. However, the comments of members of Congress on the final reported version of the Joint House and Senate Committees strongly infer that the intent of Congress was to adopt the generic and historical meanings of defined contribution and defined benefit plans and not to impose substantial, new or retroactive liabilities upon employers under Connolly-type plans.

Senator Jacob Javits stated that a § 3(34) plan includes "a target benefit plan." Cong. Rec. S.15745 (daily ed. Aug. 22, 1974). Congressman Al Ullman, Chairman of the House Ways and Means Committee, stated:

> I want to emphasize that these new requirements [including plan termination insurance under Title IV] had been carefully designed to provide adequate protection for employees and, at the same time provide a favorable setting for the growth and development of private pension plans. It is axiomatic to anyone who has worked for any time in this area that pension plans cannot be expected to develop if costs are made overly burdensome, particularly for employers who generally foot most of the bill. This would be self-defeating and would be unfavorable rather than helpful to the employees for whose benefit this legislation is designed.

Cong. Rec. H.R. 8702 (daily ed. Aug. 20, 1974). Chairman Ullman's concern of not having ERISA impose new and substantial liability on employers was reiterated by Congressman Harold R. Collier, who stated

that "[ERISA] should not be implemented in a way which will force employers to end their plans or perhaps discourage other employers from beginning them." Cong. Rec. H.R. 8714 (daily ed. Aug. 20, 1974).

This Court also has recognized that the historical difference between defined contribution and defined benefit plans was unaltered by the enactment of ERISA. *Alabama Power Company* v. *Davis,* 431 U.S. 581, 97 S.Ct. 2002 (1977). In *Davis*, this Court observed that ERISA does not alter the nature of pension plans, at least concerning questions under the Military Selective Service Act, 50 U.S.C. §§ 459(b) and (d). 97 S.Ct. at 2008, n.13. The Court further stated that:

> Petitioner's plan is a "defined benefit" plan, under which the benefits to be received by employees are fixed and the employer's contribution is adjusted to whatever level is necessary to provide those benefits. The other basic type of pension is a "defined contribution" plan, under which the employer's contribution is fixed and the employee receives whatever level of benefits the amount contributed on his behalf will provide. See 29 U.S.C. § 1002(34), (35).

97 S.Ct. at 2009, n.18.

C. Statutory Construction Supports The Generic Meaning That The Connolly Plan Is A Defined Contribution Plan

The Court of Appeals erred by totally disregarding the generic meaning of a "defined contribution plan" since statutory construction supports the District Court's finding that the Connolly Plan is a § 3(34) plan. Normally, the starting place involving the construction of a statute is the language itself. *See e.g., Ernst & Ernst* v. *Hochfelder,* 425 U.S. 185, 197 (1976). However, this Court and the lower courts have construed seemingly clear statutory terms based upon their generic meaning when to do otherwise would subvert the intent of Congress. *See e.g., NLRB* v. *Radio and Television Broadcast Engineers Union, Local 1212, International Brotherhood of Electrical Workers, AFL-CIO,* 364 U.S. 573 (1961).

In a case just decided, this Court construed the coverage of § 2(1) of the Securities Act, 15 U.S.C. § 77b(1), and § 3(a)(10) of the Securities Exchange Act, 15 U.S.C. § 78c(a)(10), concerning an employee's participation in a noncontributory, compulsory pension plan, pursuant to the commonly held understanding of an investment contract. *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America* v. *Daniel,* ——U.S. ——, Nos. 77-753 & 754 (January 16, 1979).[4] *Also see NLRB* v. *Servette, Inc.,* 377 U.S. 46 (1964), construing conduct prior to the 1959 amendments of the National Labor Relations Act (hereafter NLRA) to determine its post amendment validity under §§ 2(2) and (3), 29 U.S.C. § 152 (2) and (3), and § 8(b)(4)(A), 29 U.S.C. §§ 158 (b)(4)(A). Likewise, the Ninth Circuit, in a decision prior to *Connolly,* construed the language of § 2 of the NLRA's definition of "employer" to include an airline notwithstanding that section's exclusion of

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[4] In dicta, in note 3 of *Daniel,* the Court did state that the plan provided a defined benefit, citing § 3(35) of ERISA, because the Fund made the same payments to each eligible participant "rather than establishing an individual account for each employee tied to the amount of employer contributions attributable to his period of service[.]" It seems clear that this is tangential dicta in *Daniel,* not briefed or argued, since the sole issue concerned whether the plan was a "security" under the Securities Acts. Therefore, the issue in *Connolly* has not been answered by this Court.

employers covered by § 201 of the Railway Labor Act, 45 U.S.C. § 181, which includes common carriers tranporting by air. *Marriott Corp.* v. *NLRB,* 491 F.2d 367 (9th Cir. 1974). The Court of Appeals therefore erred in totally disregarding the generic meaning of a "defined contribution plan" in its construction of § 3(34) of ERISA.

The statutory construction of §§ 3(34) and 3(37) supports the generic meaning that the Connolly Plan is a defined contribution plan. The absence of express language of §§ 3(34) and 3(37) of ERISA to exclude "target benefit plans," such as the Connolly Plan, as defined contribution plans further substantiates Connolly's argument that a defined contribution plan should be given its generic meaning rather than its literal construction under § 3(34). The language in § 3(34) describes an individual account plan. Generically, as previously noted, an individual account plan is but one type of a defined contribution plan. Other types of defined contribution plans include target benefit, stock bonus, profit sharing, thrift, and money purchase. The language in § 3(34) is therefore descriptive of one type of defined contribution plan rather than inclusive of all types of defined contribution plans as construed by the Court of Appeals.

If Congress had intended to alter drastically the generic meaning of defined contribution plans, it would have expressly stated that *all* such plans are to have the two elements describing an individual account plan. Yet, it did not under § 3(34). Likewise, if Congress had intended that *all* "target benefit plans" (multiemployer pension plans) are defined benefit plans, it would have expressly stated such. Yet, it did

not under § 3(37). Therefore, considering the invalidity of PBGC's reasoning, the inconsistency of PBGC's position with earlier and later pronouncements of the Secretaries of Labor and Treasury, and the lack of thoroughness evident in its consideration, deference should not be given to PBGC's literal construction of § 3(34). *See, e.g., General Electric Company* v. *Gilbert,* 429 U.S. 125 (1976); *Skidmore* v. *Swift & Company,* 323 U.S. 134, 140 (1944).

II.

THE QUESTION OF WHETHER § 3(34) EXCLUDES VIRTUALLY ALL MULTIEMPLOYER PLANS IS OF CRUCIAL IMPORTANCE

The question of whether § 3(34) of ERISA excludes virtually all multiemployer plans is of crucial importance which has not been but should be settled now by this Court. AGC members are contributors to over 1,800 Connolly-type plans. The average assets of these employers is in excess of 1.325 million dollars while the plans cover over 2 million workers nationwide.

The effect of the Court of Appeals' decision will cause substantial, new, and retroactive liabilities to be imposed upon the contributing employers: up to 30 percent of an individual employer's net assets under § 4062 of Title IV of ERISA. Most individual employers could not bear the burden of such substantial increased liability. Moreover, their credit ratings will be adversely affected; their borrowing power will be diminished; the magnitude of past service liabilities will be increased as pension benefits are "sweetened"; and, pension costs will be higher due to ERISA requirements, i.e., early eligibility, faster vesting, and fuller funding. These uncontrollable cost increases in an inflationary era—totally unrelated to a company's

productivity or ability to pay—will also have a substantial and adverse economic effect on all contributing employers.[5]

The inevitable result of the Court of Appeals' decision will be what Congressmen Ullman and Collier feared: withdrawal from and termination of existing plans as well as the exclusion of the development of new plans. In Congressman Ullman's words: "This would be self-defeating and would be unfavorable rather than helpful to the employees for whose benefit this legislation is designed." Cong. Rec. H.R. 8702, *supra.*

Furthermore, conflicting duties are now imposed upon the trustees of the Connolly Plan and all other like-multiemployer plans. The trustees must not only act as fiduciaries for the participants, but must also act on behalf of the contributing employers; the employers are contingently liable for the eventual cost of benefits as adopted by the trustees and determined pursuant to investments by them under the trust agreement. The loss of the trustees' independence is inevitable, contrary to ERISA and prior laws. *See, e.g., Toensing* v. *Brown,* 528 F.2d 69, 72 (9th Cir. 1975); *Sheet Metal Workers' International Association and Edward J. Carlough (Central Florida Sheet Metal Contractors Associations, Inc.),* 234 NLRB 162 (1978).

Finally, the future administration of the termination insurance provisions of Title IV by PBGC will be

[5] In addition, dividends of a company's shareholders would either dramatically be reduced or totally nullified. The extreme personal hardship that would result to individual shareholders who depend on such dividends for, *e.g.,* living expenses, payment of bills, and retirement income would be catastrophic. The entire economy of this Nation would be adversely affected.

substantially affected by the Court of Appeals' decision. PBGC estimates that there presently exist 900 multiemployer defined benefit plans. The Department of Labor estimates that 1,800 Connolly-type plans presently exist. The effect of the substantial increase in the number of plans subject to PBGC's administration of Title IV will be catastrophic. Moreover, unless this Court grants Connolly's Petition, future litigation will occur in other circuits, further inhibiting PBGC's administration of Title IV. In fact, the issue of the scope of § 3(34) is presently pending before the United States Court of Appeals for the Sixth Circuit. *See PBGC* v. *Defoe Shipbuilding Co.,* No. 77-10151 (E.D. Mich. February 28, 1978), *appeal pending,* No. 78-1280 (6th Cir. August 7, 1978).

CONCLUSION

For the reasons stated, Connolly's Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit should be granted.

Respectfully submitted,

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